

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

**Hon. Hugh B. Scott**

09CR325A

v.

**Decision & Order**

Kevin Allen Jr., and  
Richard J. Jemes,

Defendants.

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Before the Court are the defendants' respective motions seeking discovery (Docket No. 17 and 18).

**Background**

On September 23, 2009, the Grand Jury for the Western District of New York issued an indictment against the defendants asserting two counts of unlawful possession of a quantity of cocaine base with the intent to distribute in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(C) (Counts I and II). The Grand Jury also charged the defendants with conspiring to possess and distribute cocaine in violation of 21 U.S.C. §841(a)(1) (Count III). Finally, defendant Jemes was charged in two additional counts of unlawful possession of a quantity of cocaine base with the intent to distribute in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(C) (Counts IV and V).

## **Discovery**

At oral argument, the defendants acknowledged that they have received all the discovery to which they are entitled under Rule 16 of the Federal Rules of Criminal Procedure.

## **Rule 404 & 609**

The defendants' also sought information under Rules 404 and 609 of the Federal Rules of Evidence. Federal Rule of Evidence 404(b) governs requests for disclosure of all evidence of prior bad acts that the government intends to use in its case-in-chief. The defendants request also seek disclosure under Federal Rules of Evidence 609 to the extent the government intends to use evidence for impeachment purposes should they testify at trial.

Rule 404 requires that the defendant be given "reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to use at trial." To the extent that the government intends to use any such evidence of a prior bad act in its case in chief, the government shall produce all Rule 404(b) evidence as directed by the District Court in the trial order.

With respect to the defendant's requests under Rule 609, the only notice requirement applies where a party intends to introduce evidence of a conviction that is more than ten years old. Under such circumstances, Rule 609(b) mandates that "the proponent [give] to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence." To the extent the government intends to use a conviction more than 10 years old, it must comply with this requirement.

### **Brady and Jencks Material**

The defendants assert a general request for all “Brady” material. The government has represented that it is not aware of material in its possession required to be disclosed under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. Brady material, as those cases have come to define it, includes all evidence which may be favorable to the defendant and material to the issue of guilt or punishment. Such evidence includes “[a]ny and all records and/or information which might be helpful or useful to the defense in impeaching ... [and] [a]ny and all records and information revealing prior misconduct ... attributed to the [government's] witness.” U.S. v. Kiszewski, 877 F.2d 210 (2d Cir. 1989). The defendants further seek disclosure of the statements of witnesses under the Jencks Act (15 U.S.C. §3500).

Neither the Supreme Court, nor the Second Circuit<sup>1</sup>, have ruled directly on whether there is a meaningful distinction between “exculpatory Brady” and “impeachment Brady” materials for purposes relating to the time within which such information must be disclosed. Several other courts have discussed the issue at hand, which often arises in the context of a potential, if not inherent conflict between the government's obligations to disclose under Brady, and the governments right to delay disclosure of certain information pursuant to the Jencks Act. Those cases suggest that the court has some discretion with respect to directing the timing of such disclosure. U.S. v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979)(the Court interpreted Brady to require disclosure “at the appropriate” time, which often is prior to trial); U.S. v. Perez, 870 F.2d 1222 (7th Cir. 1989)(the government's delay in disclosing Brady material violates due

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<sup>1</sup> In a footnote in its opinion in Lucas v. Regan, 503 F.2d 1, 3 n.1 (1974), the Second Circuit stated that “[n]either Brady nor any other case we know of requires that disclosures under Brady be made before trial.”

process only if the delay prevented the defendant from receiving a fair trial); U.S. v. Zipperstein, 601 F.2d 281 (7th Cir. 1979)(a defendant receives a fair trial, notwithstanding delayed disclosure of Brady material, as long as disclosure is made before it is too late for the defendant to make use of any benefits of the evidence). But see U.S. V. Wilson, 565 F.Supp 1416 (S.D.N.Y. 1983) (impeachment material need not be produced prior to trial); U.S. Biaggi, 675 F.Supp 790 (S.D.N.Y. 1987)(information bearing on a witness' credibility may be turned over at the same time as [Jencks Act] materials); U.S. V. Feldman, 731 F.Supp 1189 (S.D.N.Y. 1990)(it is sufficient for the government to disclose Brady impeachment materials along with [Jencks Act] materials).

The Jencks Act relates only to "statements" made by government witnesses. Such statements may include inconsistencies which make them useful for impeachment purposes, and thus, subject them to disclosure under Brady principles. To this extent, it has been suggested that the constitutional requirements underlying Brady could act to modify the Jencks Act. U.S. v. Campagnuolo, 592 F.2d 852, 860 (5th Cir. 1979). But see U.S. v. Presser, 844 F.2d 1275 (6th Cir. 1988)(the government may not be compelled to pretrial disclosure of Brady or Jencks material). The record in this case does not reflect whether any of the materials withheld by the government may be considered both Brady and Jencks material. Certainly "impeachment Brady" material may include several items which are not considered "statements" under the Jencks Act.

This Court believes that fundamental fairness and the constitutional due process requirements which underlie Brady mandate that the court have some discretion with respect to the timing of the disclosure of such information, even if it may be considered combined Brady/Jencks material. Indeed, even with respect to purely Jencks Act materials, the Second

Circuit has stated that "pre-trial disclosure will redound to the benefit of all parties, counsel and the court, ... sound trial management would seem to dictate that Jencks Act material should be submitted prior to trial ... so that those abhorrent lengthy pauses at trial to examine documents can be avoided." U.S. v. Percevault, 490 F.2d 126 (2d Cir. 1974); U.S. V. Green, 144 F.R.D. 631 (W.D.N.Y. 1992).

In the instant case, and while balancing all of the above, the Court concludes that should the government become aware of material to be disclosed under Brady or the Jencks Act, disclosure of such inculpatory and impeachment material in accordance with the common practice in this district (prior to trial so long as it is disclosed in sufficient time for the defendant to have a fair opportunity to utilize the information at trial) is sufficient.

### **Conclusion**

The defendants' omnibus motions are granted in part and denied in part consistent with the above.

So Ordered.

_____	<u>/s/ Hugh B. Scott</u>
_____	United States Magistrate Judge
	Western District of New York
Buffalo, New York	
February 24, 2010	